IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.71 OF 1988

Ashok Dinkar Jadhav
Yeshwada Dinkar Jadhav ...Appellants

Vs.

Shankar Mahadu Jadhav ...Respondent

Mr.N.V.Bandiwadekar with Mr.A.V.Bandiwadekar and
Mrs.A.S.Prabhu for the Appellants
Mr. P.J.Thorat h/f Mr.V.A.Thorat for the Respondents.

CORAM: A.S.OKA, J.
DATED: JANUARY 20,2005.

ORAL JUDGMENT:

1. Unsuccessful Plaintiffs in a suit for redemption of mortgage have preferred this Second Appeal. Second Appeal was admitted on 25th February 1988 by passing the following order :

. "Whether the 1st Appellate Court has fallen in error in construing the agreement dated 5-6-1952 as a mortgagee and not applying provisions of Art.34 of Limitation Act is a substantial question of law.

. Admit."

2. I have heard the Counsel appearing for the parties on the substantial question of law framed at the time admission.

3. It is the case of the Appellants that the suit land was an ancestral land in possession of Dinkar-father of the

Appellant No.1 and husband of the Appellant No.2. On 5th June 1952 by a registered document the said Dinkar mortgaged the suit land in favour of the Respondent for consideration of Rs.500/- for a period of 10 years. According to the Appellants due to some technical difficulties the document was not executed as a mortgage and was executed in the form of a conveyance. On the same day, a separate agreement was executed by the Respondent in favour of deceased Dinkar by which the Respondent agreed to re-convey the suit land within a period of 10 years on payment of Rs.500/-. According to the Appellants, the Respondent refused to redeem the mortgage though a request was made on several occasions. Therefore, a notice dated 20th May 1981 was issued by the Appellants to the Respondent. The respondent by a reply declined to redeem the mortgage and therefore the suit came to be filed.

4. The suit was resisted by the Respondent by filing a written statement. A contention was raised in the written statement that the transaction was not a mortgage and it was an out and out sale. It was, therefore, contended that the decree for redemption cannot be passed.

5. The Trial Court by Judgment and Decree dated 30th April 1984 held that the transaction was a mortgage. Therefore, the Trial Court proceeded to pass a decree for redemption of mortgage. In an Appeal preferred by the Respondent in the District Court, the Judgment and Decree of the Trial Court

has been set aside and therefore present Second Appeal is filed.

6. The learned Counsel appearing for the Appellants submitted that on the plain reading of the first document dated 5th June 1952 it clearly appears that the parties intended to create a mortgage. The learned Counsel also relied upon another document executed on the same day. The learned Counsel also relied upon the Judgment of the Apex Court reported in 1999 (3) S.C.C. page No.573 (Vidhyadhar vs. Manikrao and another).

7. Perusal of the document dated 5th June 1952 shows that it is a registered sale deed in respect of the suit land executed by deceased Dinkar in favour of the Respondent and there is no stipulation whatsoever regarding execution of reconveyance in respect of the suit land. Stipulation regarding reconveyance is in a separate document executed on the same day. It is therefore necessary to refer to Clause C of Section 58 of the Transfer of Property Act,1882 which reads thus :

"58. 'Mortgage', 'mortgagor', 'Mortgagee', 'Mortgage-money' and 'Mortgage-deed' defined-

. . . . . .

. . . . . .

(c) Mortgage by conditional sale 0 Where, the mortgagor

ostensibly sells the mortgaged property - . on condition that on default of payment of the mortgage-money on a certain date the sale shall become absolute, or

. on condition that on such payment being made the sale shall become void, or

. on condition that on such payment being made the buyer shall transfer the property to the seller

. the transaction is called mortgage by conditional sale and the mortgagee a mortgagee by conditional sale:

. [Provided that no such transaction shall be deemed to be a mortgage, unless the condition is embodied in the document which effects or purports to effect the sale]

8. A specific case of the Appellants was that mortgage by conditional sale was executed. However, in the light of the proviso to Clause c of Section 58, the transaction cannot be deemed to be a mortgage unless a condition was incorporated in the document itself relating to reconveyance. Therefore, on the face of the transaction, it cannot be termed as a mortgage. Reliance placed by the learned Counsel appearing

for the Appellants on the Judgment of the Apex Court in case of Vidyadhar (supra) is totally misplaced. In the document subject matter of the dispute before the Apex Court there was a stipulation that if the entire amount paid under the document was returned before the specified date, the property would be reconveyed. Considering the facts of the case before the Apex court, the said decision will not have no application to the facts of the present case. The Appellate Court relying upon the proviso to Clause C of Section 58 of the said Act of 1882 has rightly allowed the Appeal.

9. No substantial question of law is involved in the Appeal.

Second Appeal is dismissed with no order as to costs.

Judge.